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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1176

DAVID EARL GUTKNECHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17–22) is not yet reported. The opinion of the district court (Pet. App. 23–31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1969. Mr. Justice White extended the time for filing a petition for a writ of certiorari to March 21, 1969, and the petition was filed on March 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly declared a delinquent and ordered to report for induction as a result of his violation of Selective Service regulations.

2. Whether there was sufficient evidence showing that petitioner willfully failed to submit to induction.

STATEMENT

Having waived a trial by jury, petitioner was convicted in the United States District Court for the District of Minnesota of failing to report for and submit to induction into the Armed Forces of the United States in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for four years. The court of appeals affirmed the conviction (Pet. App. 17–22).

The evidence (the sufficiency of which is not challenged) is set forth in the Memorandum and Findings of Fact of the district court (Pet. App. 23–31). It showed that petitioner registered with his local board (Sibley County, Minnesota Board, No. 115), and was classified I–A on February 15, 1966. On March 15, 1966, having advised his board of his status as a student, he was reclassified II–S. On November 23, 1966, petitioner filed a claim for exemption as a conscientious objector, and subsequently advised his local board that he was no longer a student. His application for conscientious objector status was denied and petitioner was reclassified I–A on June 21, 1967. He took an appeal to the State Appeal Board on July 20, 1967.

On October 16, 1967, petitioner participated in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis. During that demonstration he attempted to turn his Selective Service registration and classification cards over to a Deputy U.S. Marshal, who refused to accept them. Petitioner then dropped both cards at the Deputy Marshal's feet, together with mimeographed literature explaining that his action was motivated by opposition to the Vietnam conflict.

On November 22, 1967, the Minnesota State Director notified Local Board No. 115 that petitioner's conscientious objector appeal had been denied by the State Appeal Board. On November 27, 1967, petitioner was sent a Notice of Classification advising him of the Appeal Board decision and notifying him again that he was classified I–A.

On December 21, 1967, petitioner was sent a Delinquency Notice (SSS Form No. 304) which stated that he had been declared a delinquent for failing to have his Registration Certificate and Notice of Classification in his possession. On December 26, 1967, he was ordered to report for induction on January 24, 1968. Petitioner reported to the induction center on the prescribed date, but indicated that he had no intention of submitting to processing in any way. He was informed of the pertinent regulations and of the penalties for refusing to be inducted. Petitioner signed a statement to the effect that he refused to participate in the induction process.

At trial petitioner's counsel introduced into evidence a letter and memorandum issued by the Director of the Selective Service System (Pet. App. 43–46) recommending that registrants who participate in illegal activity which interferes with the operation of the system should be reclassified and declared delinquents. No evidence was introduced which showed when petitioner would have been ordered to report for induction had he not been declared a delinquent. The district court found that petitioner was declared a delinquent solely for his non-possession of his registration and classification cards, and that General Hershey's letter and memorandum played no part in the action of the local board in declaring petitioner a delinquent (Pet. App. 29, 30).

ARGUMENT

1. Under Selective Service regulation 32 C.F.R. 1642.4, a local board is empowered to declare as delinquent any registrant who "has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) * * *." Under another regulation, 32 C.F.R. 1631.7, local boards are required to meet their monthly quotas by ordering registrants to report for induction in the following order: (1) delinquents; (2) volunteers; and (3) unmarried nonvolunteers who have attained the age of 19 years and

have not attained the age of 26 years, with the oldest being selected first. Similarly, 50 U.S.C. App. 456 (h)(1), as amended in 1967, gives priority to the induction of delinquent registrants. Petitioner had earlier been classified I–A, and does not challenge that classification here. Thus, the instant situation does not involve a "reclassification" at all. Nonetheless, petitioner claims that since the declaration of delinquency, which placed him in a priority status, accelerated his selection before volunteers and other unmarried non-volunteers who were older, this constituted the imposition of punishment in violation of the First, Fifth, and Sixth Amendments, the Military Selective Service Act of 1967, and the Selective Service regulations (Pet. 7–12).

Preliminarily, we note that there was no showing that petitioner, who was in any event already classified I–A, would not have been called, and would not have been called *when* he was called, irrespective of his delinquent status. Thus, it is not clear that the constitutional and statutory issues which he seeks to raise are necessarily presented on the instant record.[1] However, since the court below apparently assumed that petitioner's "induction date was advanced" as a result of his being declared a delinquent (Pet. App. 20), we turn to the contentions put forward on that premise.

a. On the facts of this case, petitioner, already classified I–A, was properly declared a delinquent and,

[1] A similar contention was recently rejected by this Court in *Boyd* v. *Clark*, 393 U.S. 316, at least insofar as the availability of pre-induction judicial review of such an acceleration of induction claim is concerned.

as such, was lawfully ordered to report for induction. The district court expressly found that petitioner's delinquency resulted from his failure to have his registration and classification cards in his possession, in violation of Selective Service regulations,[2] not from his participation in political protest, and that General Hershey's letter and memorandum played no part in that determination by the local board (Pet. App. 29, 30). Petitioner does not dispute the accuracy of those findings. In such narrow circumstances, the delinquency regulations, which have been in effect since the beginning of World War II,[3] provide a valid means of carrying out the objectives of the Selective Service Act to provide manpower for the Armed Forces.

Where a registrant fails to perform an explicit duty required of him under the statute or regulations—whether a failure to keep his local board informed of his status or a failure to keep his draft card in his possession—it is beneficial both to the registrant and the Selective Service System for the registrant to be declared a delinquent, rather than to be immediately subjected to criminal prosecution for his violation. It may often be that the registrant's failure to comply with the regulations was either inadvertent or impulsive and that, given the chance to reflect upon his conduct and the consequences thereof, he would choose a different course of action and take steps to purge his delinquency. In effect, the operation of the delin-

[2] 32 C.F.R. 1617.1, 1623.5; see Pet. App. 19, 29.

[3] Selective Service System regulations, Sec. 601.5, 6 Fed. Reg. 6825 (December 31, 1941); Selective Service System regulations, Secs. 642.1, 642.13, 8 Fed. Reg. 14116 (October 19, 1943).

quency regulations postpones the imposition of criminal punishment under the provisions of 50 U.S.C. App. 462, and gives the registrant an opportunity to comply with the duties imposed upon him.[4]

That the delinquency regulations further the objectives of the Act has been expressly recognized by Congress. As noted earlier, delinquency regulations have been in effect for almost thirty years (see note 3, *supra*). During this lengthy period, Congress was presumably aware of these regulations, but did not see fit to rescind or change them. Moreover, when the Selective Service Act was extensively amended in 1967, the congressional committee reports specifically noted the existence of the delinquency regulations (S. Rep. No. 209, 90th Cong., 1st Sess., pp. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess., p. 17). Indeed, Congress, in enacting the 1967 amendments to the Act, not only failed to modify or weaken the delinquency regulations, but instead inserted a provision in the statute which, for the first time, gave express recognition to their existence.[5] Thus, these regula-

[4] The delinquent is given ample opportunity to correct his delinquency under the provisions of 32 C.F.R. 1642.4 at any time, although removal from delinquency status is discretionary with the concerned local board. There is no reason here to speculate that the local board might have refused to remove petitioner's delinquent status. The record indicates that petitioner made no attempt to correct his delinquency, and had no intention of doing so.

[5] That provision—Section 6(h) of Public Law 90–40, amending 50 U.S.C. App. 456(h)—refers in terms only to the priority induction status of delinquents—a basic feature of the regulations. In using the term "prime age group" in connection with student deferments, the section defines that term to mean "the

tions are an accepted and long-established feature of the Selective Service System, which Congress has implicitly authorized and approved.

b. We recognize that in our brief in *Oestereich* v. *Selective Service Board No. 11,* 393 U.S. 233 (No. 46, this Term, decided December 16, 1968), we indicated to this Court that in some circumstances the operation of the delinquency regulations might raise serious statutory and constitutional questions. This was suggested in relation to a situation where application of the delinquency regulations had the effect of removing a registrant from an exempt status to which he was otherwise entitled by statute and reclassifying him I–A. Moreover, it was not entirely clear to us that the local board in the *Oestereich* case did not, upon the invitation of General Hershey's letter and memorandum discussed above, trigger the operation of the delinquency regulations because of Oestereich's participation in a political protest against the government's involvement in Vietnam. In that context, it was arguable that the delinquency regulations operated as a penal sanction, under the standards enunciated in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144. Our brief did not mean to suggest, however, that the delinquency regulations could not validly be applied where, as here, a registrant, not statutorily exempt from service in the Armed Forces, simply failed to comply with the duties

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age group from which selections for induction into the Armed Forces are first to be made *after delinquents* and volunteers" (emphasis added).

imposed upon him by the regulations, and where no reliance was placed on General Hershey's letter and memorandum and no reclassification was involved. On the present facts, we do not believe that petitioner was unjustifiably subjected to any substantial penal sanction.

c. Petitioner's contention that the delinquency regulations are impermissibly vague or overbroad is without merit. Those regulations authorize acceleration of the induction of a I–A registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4 (a)). This language thus simply incorporates the provisions of the Selective Service Act and regulations imposing certain duties on registrants, and petitioner has not shown that any of these provisions is impermissibly vague or overbroad. In particular, the duty involved in this case—the obligation to carry a registration and a classification card at all times (32 C.F.R. 1617.1, 1623.5)—is specific and narrowly defined, and involves no conflict with the freedoms protected by the First Amendment. That issue was settled in *United States* v. *O'Brien*, 391 U.S. 367, 377–381. The suggestion that the surrendering of his registration and classification cards were acts of "symbolic speech" protected under the First Amendment is likewise answered in *O'Brien, supra*, 391 U.S. at 376–377, 381–382. At all events, petitioner was not prosecuted for that conduct, but rather for his failure to submit to induction.

2. Petitioner contends that the government did not establish that he had failed to submit to induction because there was no showing that he had been given the opportunity to take the traditional "one step forward" at the induction center (Pet. 12–15). Petitioner's argument, however, misconstrues the term "submit to induction." Paragraph 13 of Army Regulation 601–270, involved here, provides in pertinent part:

> Definitions. For the purpose of this regulation [dealing with the operation and functions of armed forces induction stations], the following definitions will apply:
>
> * * * * *
>
> g. *Induction.* The procedure consisting of the physical inspection (or, if appropriate, the complete medical examination), mental testing (if not already accomplished), the completion of records and necessary processing to complete the transition from civilian to military status, for a period of defined obligation under the provisions of the Universal Military Training and Service Act, as amended.

Here the record shows that petitioner refused to take part in *any* of the processes leading up to the ceremonial "one step forward." It is hardly appropriate to require induction center personnel to ask a recalcitrant registrant to take the step forward where the registrant has refused to participate in the processes which would preliminarily test his physical and other qualifications for service in the Armed Forces. Petitioner's conviction for failing to submit to induction was therefore proper. Cf. *Williams* v. *United States,*

203 F. 2d 85, 87 (C.A. 9), certiorari denied, 345 U.S. 1003. Nor does petitioner's conviction present a conflict with *Chernekoff* v. *United States*, 219 F. 2d 721 (C.A. 9), since in that case the court indicated that it would have reached a different result—as it had done in an earlier case (*Bradley* v. *United States*, 218 F. 2d 657 (C.A. 9))—had the registrant been warned of the consequences of his refusal to submit to all of the induction processes. Here the record shows that petitioner was so warned, and refused to take part in those processes.[6]

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1969.

[6] Petitioner's suggestion that the indictment was defective as "duplicitous" was amply refuted by the court below (see Pet. App. 18–19). Petitioner was charged with failure to "submit to" as well as to "report for" induction (see Pet. 6), and the record plainly shows that he refused to submit to induction (see Pet. App. 24–27).

U.S. GOVERNMENT PRINTING OFFICE : 1969